DATE: May 13, 1994
CASE NO. 92-TSC-12

IN THE MATTER OF

DOUGLAS COUPAR
Complainant

v.

FEDERAL BUREAU OF PRISONS
Respondent

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Clean Air Act Amendments of 197 (42 U.S.C. § 7622 et. seq.) hereinafter "CAA" and the Toxic Substances Control Act (15 U.S.C. § 2622 et seq.) hereinafter "TSCA". These statutes prohibit an employer from discharging or otherwise discriminating against an employee who has engaged in activity protected by the CAA or TSCA. These statutes are implemented by regulations designed to protect "whistleblower" employees from retaliatory or discriminatory action by their employers. (29 C.F.R. § 24 1993). An employee who alleges a violation of these statutes may file a complaint within thirty days after the alleged violation.

The issues in this matter concern whether the Complainant is an employee of the Federal Bureau of Prisons and Federal Prison Industries (FPI) within the meaning of the CAA and TSCA.

BACKGROUND AND PROCEDURAL HISTORY

This case presents Complainant's fifth complaint alleging that he was the victim of a retaliatory action (transfer to Federal Correctional Institution at Oakdale, Louisiana) as a result of his prior whistleblowing activities. Prior to this complaint, Complainant filed two claims in 1990 and 1991, which were consolidated as 90-TSC-00001 and 91-TSC-00003, Douglas A. Coupar v. Federal Correctional Institution, El Reno, OK, alleging retaliatory action by FPI. On December 13, 1991, Administrative Law Judge G.

Marvin Bober, U.S. Department of Labor, issued a Recommended Decision and Order in which he dismissed

Complainant's consolidated complaints. Judge Bober determined that a federal prisoner working for FPI is not an employee within the meaning of either the CAA or TSCA, and is therefore not entitled to their whistleblower protection provisions.

Complainant filed two more claims in 1992, 92-TSC-00006 and 92-TSC-00008, which were consolidated as Douglas Coupar v. Federal Prison Industries/UNICOR. In those complaints, Complainant alleged retaliatory action by FPI and harassment by the associate warden of the Federal Correctional Institution at Terminal Island, California for filing previous complaints. In a Recommended Decision and Order dated June 11, 1992, Administrative Law Judge Samuel J. Smith, U.S. Department of Labor, dismissed complaint number 00008 but held that an employment relationship existed between Complainant and FPI so as to afford Complainant the whistleblower protection of the CAA and the TSCA.

The Secretary of Labor did not issue a final order after either decision of Judge Bober or Judge Smith.

In connection with the present claim, Complainant filed a Motion to Stay proceedings before the Office of Administrative Law Judges pending a ruling from the Secretary of Labor that the Department of Labor has subject matter jurisdiction over environmental whistleblower complaints filed by inmates incarcerated by the Federal Bureau of Prisons. However, that motion was denied by the undersigned and the hearing set in the matter was cancelled.

On March 22, 1993, the undersigned issued an Order to Show Cause by April 9, 1993, why the proceeding should not be dismissed for the failure of Complainant to show his entitlement to protection under the employee protection provisions of the TSCA. Complainant filed a motion for an extension of time in which to respond to the Show Cause Order, which was granted on May 27, 1993, giving Complainant until July 15, 1993, to respond.

On March 29, 1993, Respondent filed a Motion to Dismiss asserting that the Office of Administrative Law Judges lacks jurisdiction to issue or enforce further proceedings in this matter. In support of its motion, Respondent argued that a prior opinion of the U.S. Department of Justice's Office of Legal Counsel holding that prison inmates are not afforded whistleblower protection status under the CAA or TSCA, and Judge Bober's decision in Douglas A. Coupar v. Federal Correctional Institution, El Reno, OK, 90-TSC-00001 and 91-TSC-00003, should be given preclusive effect.

On July 19, 1993, Complainant filed a response to Respondent's Motion to Dismiss, alleging that he was an employee of FPI and was therefore entitled to the protection of the

whistleblower statutes, and incorporating by reference the arguments and rationale of Judge Smith's decision in Coupar v. Federal Prison Industries/UNICOR, 92-TSC-00006/00008.

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As the Secretary did not issue a final order after the recommended decision and order of either Administrative Law Judge Bober or Smith, neither decision can be considered a final order under the provisions of 15 U.S.C. section 2622(b)(2)(A); 42 U.S.C. section 7622(b)(2)(A); and 29 C.F.R. sections 24.4-24.7(a). Accordingly, the undersigned finds that the doctrines of res judicata and collateral estoppel do not apply to either decision of Administrative Law Judges Bober or Smith.[1]

At the outset it should be noted that Complainant has never maintained that an employment relationship exists between him and Respondent. Rather, Complainant argues that Respondent has engaged in a form of blacklisting (retaliatory transfer) that has caused him to lose his work status with FPI, a government corporation of which he is an "employee". The Secretary has noted that continual blacklisting is a form of insidious and invidious discrimination prohibited by the Energy Reorganization Act (ERA). See Egenrieder v. Metropolitan Edison Co./G.P.U., 85-ERA-23, 1 OAA 2, 425, 427 (April 20, 1987); Deford v. Secretary of Labor, 700 F.2d 281, 287 (6th Cir. 1983)(affirming Secretary's finding that a work transfer and demotion constituted a retaliatory discriminatory action in violation of the ERA). See also Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990)(conduct which causes a former employee to lose a new job is a form of blacklisting prohibited by Title VII). The Secretary has determined that an employer/employee relationship need not exist between a complainant and a respondent in cases arising under the ERA, the National Labor Relations Act (NLRA), and Title VII of the Civil Rights Act of 1964. See Hill V. Tennessee Valley Authority, 87-ERA-23 (Sec. of Labor 5/24/89); Ottney v. Tennessee Valley Authority, 87-ERA-24 (Sec. of Labor 5/24/89); 29 U.S.C. § 152 (1982); Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir. 1983).

There have been no decisions from the Secretary regarding whether a prisoner can have employee status under the CAA or the TSCA, and the statutes themselves do not define the terms "employee" and "employer." However, federal or state prison inmates have been held not to be "employees" entitled to bring discrimination claims under either the Fair Labor Standards Act,

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[1] Neither party has asserted that the "law of the case" doctrine applies in this administrative law forum and it does not appear that it does.

Title VII, the Equal Pay Act, or the Rehabilitation Act. See Hale v. Arizona, 993 F.2d 1387, 1394 (9th Cir. 1993); Williams v. Meese, 926 F.2d 994 (10th Cir. 1991)[2]; Young v. Cutter Biological, 694 F. Supp. 651 (D. Ariz. 1988). See also, Sprouse v. Federal Prison Industries, Inc., 480 F.2d 1 (5th Cir. 1973)(disallowing suit brought by federal prison inmate under the FLSA against a U.S. government corporation on the grounds of sovereign immunity).

Moreover, to establish that Respondent has blacklisted Complainant from an employment opportunity with FPI, Claimant would necessarily have to first establish that he was, is, or has an opportunity to be, an employee of FPI. The published decisions from the Office of Administrative Law Judges recommend that Claimant is not an "employee" of FPI within the meaning of the whistleblower provisions of the CAA or TSCA. See Bryant v. UNICOR/Federal Prison Industries, 92-CAA-4, October 23, 1991, 6 OALJ 5, 1; Teves v. Federal Prison Industries (UNICOR), 91-CAA-1, April 25, 1991, 5 OALJ 2, 6; Nottingham v. Federal Prison Industries (UNICOR), 91-CAA-2, April 23, 1991, 5 OALJ 2, 1. In the absence of a final order from the Secretary, the undersigned adopts the reasoning of the Bryant decision and concludes that Claimant is not an "employee" of FPI under the CAA or the TSCA. As noted by Judges Burke, Complainant's relationship with FPI arises out of his incarceration, and it is not a voluntary employment relationship as contemplated at common law. Bryant, 6 OALJ 5 at 3. See also Judge Roketenetz's analysis in Nottingham, 5 OALJ 2 at 3, and Teves, 5 OALJ 2 at 8. In Bryant, Judge Burke reasoned that:

> Complainant is . . . under a legislative mandate to perform such work as FPI assigns him . . . . He did not voluntarily enter a contract to work nor [is] he entitled to compensation [under the statutory provisions of 18 U.S.C. 4126] . . . . The economic reality is that [Complainant] has not contracted with FPI nor is he in a position to negotiate or bargain with FPI . . . . When Complainant is released from prison he will no longer perform work for FPI.

Bryant, 6 OALJ 5 at 3.

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[2] The Meese court, however, did acknowledge that Claimant could maintain a Bivens claim for deprivation of right to equal protection under the Fifth Amendment against prison officials who discriminated against him on the basis of race, age, or handicap in choosing whether to assign him to a particular job, and could also bring a discrimination claim against prison officials who denied Claimant job assignments and transferred him from one job in retaliation for exercising his First Amendment rights. Meese, 926 F.2d at 998.

Complainant in this case is similarly situated to the Complainants in Bryant, Nottingham, and Teves. His work opportunities with FPI will end necessarily when he is released from prison. Accordingly, the undersigned finds that Complainant is likewise not an "employee" of FPI and is therefore not entitled to the whistleblower protection provisions of the CAA or the TSCA. Respondent's motion to dismiss for lack of jurisdiction is granted.

RECOMMENDED ORDER

It is hereby recommended that:

1. Respondent's motion to dismiss for lack of jurisdiction be granted.

2. The Complaint of Douglas Coupar be dismissed.

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QUENTIN P. MCCOLGIN
Administrative Law Judge

QPMC:mef